IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Appeal No. 081348

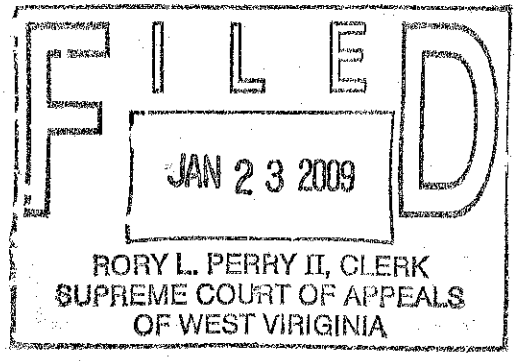
LANGLEY and INEZ FRANCE, individually and
as the Parents and Next Friends of
ROBERT FRANCE, a Minor,

Appellant,

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation,

Appellee.



REPLY BRIEF OF APPELLANTS

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TABLE OF AUTHORITIES

West Virginia Supreme Court Decisions

Other Jurisdictions Decisions

Federal Regulations

West Virginia Statutes

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Appellants Langley France and Inez France, as the parents and next friends of Robert France (Robert), a minor at the time of the events giving rise to this cause of action, respectfully request, for the reasons set forth more fully in their "Brief of Appellants," that this Honorable Court reverse the ruling of the Circuit Court of Logan County, West Virginia, Perry, J. The Appellant contends the Circuit Court improperly granted summary judgment in favor of Appellee Southern Equipment Company (Southern) despite the fact that material questions of fact remained regarding whether Southern knew of Robert's age which made it illegal for Southern to permit Robert to engage in roofing work, whether the work required of Robert, replacing an industrial metal roof at the age of sixteen (16) and the height of twenty-five (25) feet, was inherently dangerous, and whether, as the controlling employer, pursuant to OSHA law, on a multi-employer work site, Southern was barred from hiding behind the independent contractor defense.

A. Appellees' Delayed Inclusion of Any Discussion or Argument Pertaining To Southern's Illegal Employment of Sixteen-Year-Old Robert.

Appellant has no objection to Appellee's untimely filed Amended Brief which added Appellee's arguments which attempt to escape what is clearly a question of fact for the jury

regarding whether Southern was aware of sixteen-year-old Robert's age because Appellants feel it is important to have all of the facts and both arguments before the Court as it decides this important issue. What Appellants do object to, however, are Appellees arguments that Appellants did not properly raise the issue of the illegality of Robert's employment or the issue of the inherently dangerous nature of the employment at issue at the summary judgment level before the Circuit Court.

Even the most basic review of the record reveals that both documents 160 (pp. 998-1049) and 162 (pp. 1061-1122) discussed at length the issues of whether Southern's illegal employment of Robert, in violation of both state and federal child labor laws, stripped Southern of the independent contractor defense, whether Southern's employment of a minor to engage in commercial roofing, twenty-five (25) feet above the ground was so inherently dangerous that it likewise stripped Southern of any immunity derived from the independent contractor defense, and why such issues were questions of fact for the jury.

These documents, which were both clearly filed before the Circuit Court entered its Order, document 166 (pp. 1146-1155), and which are both labeled as responsive briefs in "Opposition to Defendant Southern Equipment Company's Motion for Summary Judgment," were obviously presented to the Circuit Court before it ruled on Appellee Southern's Motion for Summary Judgment. Thus, for Appellee to state otherwise begs the question of on what other grounds is Appellee being what must be termed at best confused and at worst disingenuous. Appellants assert that this confusion/disingenuousness pervades throughout Appellee's brief and that all of Appellee's arguments must be viewed in light of Appellee's complete misapprehension of issues and facts before this Court. That being said, Appellee's specific arguments are addressed below:

B. Whether Appellee Southern Was Aware that Sixteen-Year-Old Robert Was Performing Roofing Work Despite His Young Age Is a Question of Fact for the Jury.

The defense of "independent contractor," asserted by Appellee Southern in response to virtually all of Appellants' arguments for liability, must be acknowledged as "a slender reed . . . which the courts have found difficulty to apply." See Sanders v. Georgia-Pacific Corp., 225 S.E.2d 218, 221 (W. Va. 1976). "This is because, as [the Supreme Court of Appeals of West Virginia has] previously acknowledged, . . . the independent contractor defense is riddled with numerous exceptions that limit its applicability." See Shaffer v. Acme Limestone Co., Inc., 524 S.E.2d 688, 695 (W. Va. 1999). One of those exceptions, and one most applicable in this case, is the illegal work exception.

This exception, succinctly stated, provides that "[t]he doctrine of the nonliability of one for the negligence of another because the latter is an independent contractor does not apply to relieve the former from liability for the omission of a duty imposed upon him by law in behalf of the safety of the public." See Shaffer, 524 S.E.2d at 700 (quoting Syl. pt. 5, Carrico v. West Virginia Cent. & Pac. Ry. Co., 19 S.E. 571 (W. Va. 1894)).

In accordance with this principle, the Court in Shaffer v. Acme Limestone Co., Inc., 524 S.E.2d 688, 701 (W. Va. 1999), explicitly held that

> [T]he independent contractor defense is unavailable to a party employing an independent contractor when the party (1) causes unlawful conduct or activity by the independent contractor, or (2) knows of and sanctions the illegal conduct or activity by the independent contractor and (3) such unlawful conduct or activity is a proximate cause of an injury or harm.

See Syl. pt. 6, Shaffer, 524 S.E.2d 688 (emphasis added). This test, which is clearly stated in the disjunctive, provides that the independent contractor defense is unavailable when the party employing the independent contractor "knows of and sanctions the illegal conduct or activity by the independent contractor."

Here, Appellee Southern does not dispute the disjunctive nature of this test. What it does dispute, however, is the fact that it employed the independent contractor, Royalty Builders, and the fact that it knew of Robert's young age. Yet, sufficient questions of fact have been raised with regard to both of these items that summary judgment was improper.

First, with regard to Appellee Southern's assertion that it did not even know that it was employing Royalty Builders, the facts dispute this assertion. Specifically, the fact that Appellee Southern paid Royalty Builders, by separate check, addressed to Royalty Builders, $15,000.00 for its work on the project disputes this assertion. See Bates No. Document SEC00011-12, previously designated as part of the record and attached for convenience as Exhibit A. Appellee Southern may maintain, and correctly so, that this check was not dated until after Robert's accident, but the fact remains, Royalty Builders and Appellee Southern entered into a separate contract.[1] In fact, Dan Hensley, of Royalty Builders, was specific that he thought he was working for Southern the entire time, and that Southern paid him. (Hensley depo. pp. 82, 83).

Perhaps more importantly, the evidence indicates, that from day one, Ken Zigmond, Appellee Southern's Vice President and the individual responsible for this job on Appellee Southern's behalf, knew that Dan Hensley of Royalty Builders was from a different company than Quality Metal Roof Manufacturing and Sales, Inc. (QMR). This is because, before the job started, Mr. Akers, of QMR, introduced Mr. Zigmond to Dan Hensley of Royalty Builders, who was responsible for tearing off the old metal roof and replacing it with new panels.

In fact, Mr. Akers testified that he personally visited the building with Mr. Hensley, to allow Mr. Hensley to see first hand the work needed to be done. Both arrived in separate trucks. (Akers depo. p. 58). He further testified that at this visit, Mr. Zigmond came outside to the location where

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[1] It is also interesting to note that the contract provides that payment is not to be made until the work is completed, but the check is dated the day after the contract was signed.

Mr. Hensley was climbing up the ladder onto the roof. (Akers depo. p. 59). Mr. Hensley's truck, even according to Mr. Zigmond, had the name "Royalty Builder" painted on it. (Zigmond depo. pp. 50, 51). Finally, Mr. Akers testified that he even told Mr. Zigmond that Mr. Hensley would be doing the work and Mr. Zigmond allowed them to use Southern's ladder to climb onto the roof. (Akers depo. p. 59).

Thus, based on these facts, which were submitted to the Circuit Court prior to the issuance of its erroneous ruling, a clear question of fact remains regarding whether Appellee Southern was aware that Royalty Builders was employed to work on its roof. An equally clear question of fact exists regarding whether Appellee Southern knew of Robert's young age.

Robert's young age was noted by Mr. Zigmond. Mr. Zigmond testified that Robert stood out from the other workers because he was younger than them. In fact, Mr, Zigmond acknowledged that, "It was pretty apparent that Robert was younger than the other workers." (Zigmond depo. p. 35). Mr. Zigmond, acting on behalf of Southern, claimed he never knew Robert's exact age, but he said everyone else knew that Robert was a "kid." (Zigmond depo. p. 9). The full exposition of this testimony provides a clear picture of what Mr. Zigmond knew, or should have known, about Robert's age.

Q: Did you recognize him from any of the previous days?

A. No. I seen all of them, but, you know, as far as picking him out from any of the other people, no, I did not.

Q. He didn't stand out that way?

A. Well, he was young. Younger than the other people that was working, yes.

Q. Was that apparent to you?

A. It was pretty apparent, yes.

(K. Zigmond depo. p. 35)

Q. You knew he was a kid, though, didn't you?

A. Yes.

Q. Everybody knew he was a kid?

A. Yeah.

(K. Zigmond depo. p. 90).

Thus, it is clear from the testimony that a reasonable fact finder could conclude that Mr. Zigmond thought that Robert was "a kid,"i.e someone younger than eighteen (18) years of age. Therefore, Appellee Southern's arguments that it did not know Robert's young age has clearly been factually questioned, making summary judgment based on the independent contractor defense improper.

Appellee Southern attempts to get around these clear factual disputes by inserting, into the illegal employment exception the requirement that the employer know that the work was illegal. This requirement is not contained in Shaffer. Yet, Appellee Southern attempts to insert it by arguing that "[t]his Court made it clear that 'an employer will not be liable for the negligence of an independent contractor where the work is 'not in itself unlawful.'" Interestingly, Appellee Southern elects not to put a citation in that would indicate where in Shaffer that quotation came from, but a careful search revealed that it came from page 700, and was shortly followed on page 701 by the quote that "[a]s a general matter, a violation of a statute may be deemed an illegal act."[2] See Shaffer, 524 S.E.2d at 701.

Here, West Virginia Code § 21-6-2(a)(16) explicitly states: Employment of children under eighteen in certain occupations: appeal to Supreme Court (a), "No child under eighteen years of age

[2] Ignorance of the law has never proven to be a defense in this state. Yet, it appears that is exactly what Appellee Southern is attempting to assert in its Brief.

may be employed, permitted or suffered to work in, about, or in a connection with any of the following occupations (16) Roofing operators above ground level." (Emphasis added).[3]

The federal regulation not only makes such employment illegal, but calls it "particularly hazardous," as 29 C.F.R. § 560.67 provides: "...all occupations in roofing occupations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health."

Finally, Appellee Southern also attempts to argue proximate cause. Specifically, Appellee Southern actually contends that the fact that Robert was only sixteen (16) played no role in his injury. This is simply not true.

First, for the sake of clarity, it is important to emphasize the fact that the law simply requires age to be a proximate cause of the injury, not the sole proximate cause of the injury. See Syl. pt. 6, Shaffer, 524 S.E.2d 688; see also Syl. pt. 2, Mays v. Chang, 579 S.E.2d 561 (W. Va. 2003). Therefore, it is not necessary to prove that Robert was only injured because he was sixteen, but rather that the fact that he was sixteen played some role in his injury. Further, the law also emphasizes that issues of proximate cause should generally be left to the jury's determination and are most often not appropriate basis for summary judgment. See Syl. pt. 3, Mays, 579 S.E.2d 561.

Here, the issue of proximate cause is clearly a jury question as federal and state law make clear that roofing is particularly dangerous for those under the age of eighteen, the age category Robert fell into. Further, several studies conducted by NIOSH have emphasized that young workers

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[3] This child labor statute must be broadly applied to protect the welfare of the young. Many states enacted child labor laws in the early years of the last century, including West Virginia. In Harper v. Cook, 82 S.E.2d 427 (W.Va. 1954), this Court applied the terms "permitted" and "suffered to work" to mean that the "defendant would have had to have knowledge that he (the child) was working there." Id. at 433. There is ample evidence that Mr. Zigmond, Southern's vice president, had notice of Robert's age and the fact he was working on the roof. Thus, liability should be imposed on Appellee Southern.

tend to have a higher nonfatal injury rate than older workers due to their special risk factors, which include inexperience on the job, incomplete physical and psychosocial development, and inadequate training and supervision. See Traumatic Injury Research at NIOSH: Reviews of Research Programs of the National Institute for Occupational Safety and Health, p. 2-37, available at www.nap.edu; see also NIOSH Alert: Preventing Falls of Workers Through Skylights and Roof and Floor Openings, available at www.cdc.gov/niosh.

Finally, the very way Robert was allegedly injured speaks of someone who is young and inexperienced and whose inexperience led to their injury. This is because, Appellee Southern asserts that Robert was injured while running across the roof. Appellants submit that an older, more experienced worker would not have been running across that dangerous roof in such a manner. Thus, it is clear that Robert's age and inexperience did play a role in his injury. Accordingly, the lower court's granting of summary judgment without even truly considering the issue of the illegality of Robert's employment was improvident.

C. Whether Installing a Metal Roof on a Commercial Facility Where No Sub-Roof Exists is an Inherently Dangerous Undertaking is a Question of Fact for the Jury's Consideration.

The lower court also erred when it failed to determine the unique nature of the roofing project at issue and how that roofing project was inherently dangerous. Just as illegal work provides an exception to the independent contractor defense, so does inherently dangerous work. If the work a landowner or general contractor contracts out to an independent contractor "is intrinsically dangerous in character or is likely to cause injury to another person if proper care should not be taken, such employer cannot escape liability for the negligence of such work by delegating it to the independent contractor." See Shaffer, 524 S.E.2d at 698 (quoting Syl. pt. 5, Law v. Phillips, 68 S.E.2d 452 (W. Va. 1952). This is because "the possibility of harm to others is so great when the work activity is inherently dangerous that the law tolerates it only on terms of insuring the public against injury."

See id. (quoting King v. Lens Creek Ltd. Partnership, 483 S.E.2d 265, 271 (W. Va. 1996). To constitute an inherently dangerous activity, "the work must be dangerous in and of itself and not dangerous simply because of the negligent performance of the work, and that danger must be naturally apprehended by the parties when they contract." See id.

Here, the work at issue is roofing, which has consistently ranked among the most dangerous occupations in the United States. See The 10 Most Dangerous Jobs in America, MSN Money, available at www.moneycentral.msn.com (2009); 8 Most Dangerous Jobs in the World, Quality Health, available at www.qualityhealth.com (2009); The Ten Most Perilous Occupations in America, hrtools, available at www.hrtools.com (2008). The exact work at issue, however, the replacement of an industrial metal roof with an industrial metal roof is far more dangerous than a simple roofing operation.

Mr. Donovan Grenz, the expert witness retained by Appellants whose testimony went undisputed in the proceedings before the lower court, explained that this metal roof replacement was inherently dangerous in and of itself, because there was "nothing underneath" the roof except open air. He further pointed out that this work was unique among roofing jobs, because it was not "a built up roof where you take off rock and tar and put down new rock and tar. You still have something to stand on." (Grenz depo. p. 91).

Mr. Grenz further distinguished this industrial metal roof replacement from other roofing work. As he explained:

> This is not a typical job. It is not like a roofer going around to a residential area and putting metal roofing on a house. This is a very complicated roofing structure that requires pre-planning by an experienced roofing crew. Southern Equipment spent a lot of money in my opinion, putting a new roof on, to the tune of some 33,000 that was allocated for this, and the ultimate decision fell onto Ken Zigmond, but he did present it in front of his board and they gave him the go ahead. So, this is not a small operation. This is a very large building.

(Grenz depo. pp. 90-91).

Finally, Mr. Grenz thoughtfully added the following in regard to the issue of eliminating or reducing the hazard of working more than six feet above ground without fall protection:

> When you rely on personal protective equipment as your sole source of protection, that does not say that you're not going to get injured, it says you're not going to get dead. You may still may be injured. And they teach us in the fall protection class, just because you give them the safety equipment doesn't mean they use it, if they challenge that system, they're not going to get hurt because they certainly may. And that in and of itself make it an inherently dangerous job.

(Grenz depo. p. 98).

Thus, it is evident from Mr. Grenz's undisputed testimony that this roofing job was different, and more dangerous, than other roofing jobs. The proper personal protective equipment could have been used and, because of the unique nature of this job, the job would have still remained dangerous. Appellee Southern is correct in its statements that everyone has a roof, but its attempts to minimalize the danger posed by this roofing job with cliches about everyone having a roof over their heads should not be tolerated. This was a unique roofing job with an inherent risk of danger and the lower court's failure to view it as such must be overruled.

Finally, it will not be discussed in great detail here because it was covered in such detail in Appellants' original brief, but it is important to note that the lower court's confusion of the inherently dangerous standard and the abnormally dangerous standard was not harmless error. Nor was the lower court's references to older, lower court cases in North Carolina as some type of majority precedent.

Courts across the United States have routinely held that the question of whether an activity is inherently dangerous is a jury question that must be analyzed on a cases by case basis. For example, the Court of Appeals of Ohio in the case of Bohme, Inc. v. Sprint Inter. Communications Corp., 686 N.E.2d 300, 309 (Ohio 1996), analyzed the Restatement (Second) of Torts § 427's definition of what constitutes an inherently dangerous activity and what entity is responsible for

making such a determination. It found, relying on the Restatement, that the "determination of what constitutes an inherently dangerous activity should be made by the trier of fact which is in the best position to evaluate the inherent danger of the work in different circumstances." The Court of Appeals of Michigan reached a similar result in Brown v. Unit Products Corp, 36 N.W.2d 425, 429 (Mich. 1981) as did the Supreme Court of Kansas in McCubbin v. Walker, 886 P.2d 790, 799 (Kan. 1994). In fact, a survey of those jurisdictions deciding the issue presented here of whether an activity, including roofing or construction, is inherently dangerous reveals an overwhelming majority, 19 in all, hold that is a question of fact for the jury to decide.[4] Those jurisdictions are: Alabama, Ledbetter- Johnson Co. v. Hawkins, 103 So.2d 748 (Ala. 1958) (holding that whether an activity was intrinsically dangerous was for the jury); California, Caudel v. East Bay Mun. Utility Dist., 211 Cal. Rptr. 222 (Cal. App. 1.Dist.,1 985) (holding that whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others is for the jury); Colorado, Western Stock Center. Inc. v. Sevit. Inc., 578 P.2d 1045 (Colo. 1978) (holding whether activity which independent contractor to perform is inherently dangerous was for jury); Connecticut, Gurland v. D'Adamo. 579 A.2d 144 (Conn. Super. 1990) (question of whether activity was inherently dangerous was a question for the jury); District of Columbia, Levy v. Carrier, 587 A.2d 205 (D.C.,1991) (holding that the knowledge of whether there is a special danger inherent in the activity of the independent contractor is obviously a question of fact for the jury); Florida, Doak v. Green, 677 So.2d 301 (Fla. App.1 Dist., 1996) (holding that, as a general rule, it is a fact question for the jury whether the undertaking of and independent contractor is inherently dangerous); Georgia, Community Gas Co. v. Williams, 73 S.E.2d 119 (Ga. App.,1952) (holding that

[4] Appellee Southern asserts in its Brief that Appellants were less than honest with the Court with regard to their string citation of cases from other jurisdictions. That is untrue. Above is Appellant's string citation, with the holding from each case set forth.

it is a jury question whether work was, in its nature, inherently dangerous to others); Hawaii, Nofoa v. U.S., 132 F.3d 39, 1997 WL 796198, Unpublished Disposition" C.A.9 (Hawaii) (holding that is "reasonable minds" can disagree "as to whether an activity is inherently dangerous, the determination is a question of fact to be determined by the fact-finder"); Kentucky, Pine Mountain R. Co. v. Finley, 117 S W. 413 (Ky., 1909) (holding that the liability of the employer to third persons for injuries from the use of an inherently dangerous product is one for the jury); Maryland, Washington Suburban Sanitary Commission v. Grady Development Corp., 377 A.2d 557 (Md .Spec. App. 1977)(holding question as to whether an activity is inherently dangerous is one for a jury); Massachusetts, Lebrun v. Stop & Shop Supermarket Co., 851 N.E.2d 478 (Mass. 2006) (holding a jury question was presented as to whether plaintiff was engaged in an inherently dangerous activity); Michigan, Warren v. McLouth Steel Corp., 314 N.W.2d 666 (Mich.App.1981) (holding it is a jury question whether an activity is inherently dangerous); New Hampshire, Elliott v. Public Service Co. of New Hampshire, 517 A.2d 1185 (N.H.1986) (holding whether an activity is inherently dangerous, for purposes of principal's liability to employee of independent contractor, is a question of fact to be determined by the trier of fact); New Jersey, Majestic Realty Associates, Inc. v. Titi Contracting Co., 149 A.2d 288 (N.J. Super. App.1959) (holding that distinguishing whether an activity is inherently dangerous is a task for the jury); New York, Rosenberg v. Equitable Life Assur. Soc. of U.S, 595 N.E.2d 840 (N.Y.1992) (holding whether work is inherently dangerous so as to be within exception to the general rule that employer is not responsible for negligence of independent contractor is normally question of law to be determined by the jury); Oregon, Golden v. Ash Grove Cement Co., Slip Copy, 2007 WL 1500168 (D. Or. 2007) (citing Snyder v. Prairie Logging Co., 207 Or. 572, 577 (1956)) (holding that the question of whether a particular employment is inherently dangerous is for the jury to decide); Rhode Island, Blount v. Tow Fong, 138 A. 52 (R.I. 1927) (holding whether an activity was inherently dangerous is for the jury);Texas,

Sun Oil Co. v. Kneten, 164 F.2d 806 (C.A.5.Tex.1947) (holding the question of the inherently dangerous nature of an activity is one for the jury); and Washington, Garza v. McCain Foods, Inc., 124 Wash. App. 908, 103 P.3d 848 (Wash. App. Div. 3 2004) (holding it is a question of fact for the jury whether a certain activity or occupation is inherently dangerous).[5]

It is apparent, the lower court improperly invaded the province of the jury when it ruled on whether the roofing job at issue was inherently dangerous. Thus, its decision must be reversed.

D. Whether the Fact that the Southern Jobsite was a Multi-Employer Jobsite Created a Question of Fact Regarding the Issue of Control.

Much like the question of whether an activity is inherently dangerous is a question of fact for the jury, the question of whether an employer or owner had the right of control, sufficient to eliminate the independent contractor defense, is a question of fact for the jury. See Syl. pt. 2, Sipple v. Starr, 520 S.E.2d 884 (W. Va. 1999), Syl. pt. 1, Sanders v. Georgia-Pacific Co., 225 S.E.2d 218 (W. Va. 1976). Here, Appellants adduced evidence, through the testimony of Mr. Grenz, which showed that, because this was a multi-employer work site, Southern had the right to control Royalty Builders.

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[5] Appellants also cite Donovan v. General Motors, 762 F .2d 701 (8thC ir. 1985) (applying Missouri law) for the precedent that whether a task is inherently dangerous is a question of fact for the jury. Appeellee Southern, in another of its many attempts to mislead the Court, states that the holding in Donovan was not followed by any other courts. This is not true. The holding in Donovan was followed by Hatch v. V.P. Fair Foundation, Inc., 990 S.W.2d 126 (Mo. 1999), McMillan v. U.S., 112 F.3d 1040 (9th Cir. 1997), and Fagandes v. State, 774 P.2d 343 (Idaho 1989).

As. Mr. Grenz pointed out, this was a multi-employer work site according to OSHA law.[6] See 29 C.F.R. §1926.501. Mr. Grenz explained that Southern was the controlling employer, because it owned the building where the roofing work took place. (Grenz depo. p. 82). Additionally, under the OSHA multi-employer work site doctrine, Southern was required to provide fall protection and other safety measures because its employees are exposed to the hazards of the metal roof replacement and from falling objects falling through the roof. This is because, even as testified to by Southern employees Jerry Shelton and Tom Staggs, Southern's employees were working both on the roof and beneath it as metal was being torn off and replaced. (Grenz depo. pp. 81, 86, 111, 115).

Appellee Southern attempts to circumvent the clear applicability of the OSHA rules by arguing that OSHA cannot apply in the context of an independent contractor. As explained by Mr. Grenz, this is simply incorrect. Further, Appellee Southern has produced no expert that would say that Mr. Grenz is incorrect, it simply wants to rely on its own reading of the OSHA regulations, a reading which is clearly inaccurate according to Mr. Grenz.

The correctness or incorrectness of Mr. Grenz, however, does not need to be decided by this Court and should not have been decided by the lower court due to the fact that the right of control is a jury question once evidence has been adduced to call it into question. Here, control is disputed.

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[6] A central point of the evidence on which Mr. Grenz relies in establishing the OSHA multi-employer work site is found in the deposition testimony of Mr. Jerry Shelton. Southern employed Mr. Shelton, who was working in the area beneath the roof replacement work and on the roof itself. Mr. Shelton testified that the roof above had been pulled up; that you could watch the work as it progressed and you could even "see the sun coming through the insulation." (Shelton depo. p. 14). Another Southern employee, Tom Staggs, was fully corroborative of Mr. Shelton. Mr. Staggs testified that he could see the original roof material was pulled away and that Southern employees did not "get out of the way from down below." (Staggs depo. pp. 40, 41). As Mr. Grenz explained, with the roof open to this area where Southern employees were working below, they would be exposed to falling objects. (Grenz depo. pp. 73, 74).

Therefore, the lower court's ruling on the issue of control must be reversed as it improperly invaded the province of the jury.

E. The Lower Court's Flawed Summary Judgment Order

An analysis of the lower court's summary judgment order reveals at best a disappointing effort by the lower court to address the facts, and in any event demonstrates that the lower court considered some factual matters and ignored others altogether. Specifically, the lower court completely ignored the fact that Royalty was a business separate and apart from QMR and that Appellee Southern should have known this fact. The lower court also ignored the fact that Appellee Southern either knew or should have known that Robert was under eighteen years of age thus making his employment illegal. In any event, the lower court engaged in an improper weighing of the facts.

The second area of grave concern raised by the lower court's ruling is that the lower court launched its opinion relying on an impermissible factual standard it adopted from several older, lower level cases from North Carolina while ignoring the vast majority of jurisdictions which hold to the contrary. Worst of all, confronted with evidence of illegal employment, the lower court elected to completely ignore the half of the Shaffer decision that deals with illegal employment. Instead, the lower court simply ruled as though Shaffer was never written, preventing this case from going to a jury where it rightfully belongs. In sum, the lower court ignored the facts and misconstrued the law all in an attempt to create summary judgment where summary judgment was improper.

F. Conclusion

In making its ruling for summary judgment, the lower court improperly invaded the province of the jury. It is a jury question whether Southern's illegal acquiescence of Robert's employment was a proximate cause of his injury. Likewise, it is a jury question whether the work Robert was

required to perform was inherently dangerous. Finally, it is a jury question whether Appellee Southern had the right and the duty to control the work site under OSHA regulations. Accordingly, the lower court's granting of summary judgment was improper.

The facts adduced in this case have revealed that Robert France was only 16 years old, a kid, when he, like a kid might, allegedly ran across a roof while trying his best to do his job. It is not Robert's fault that he was illegally employed. Nor is it his fault that he was forced to work on an inherently dangerous job site. Therefore, Robert's right to recovery should not be barred by the mistakes made by the lower court.

WHEREFORE, for the reasons cited more fully above as well as in the Brief of Appellants, Appellants Langley France and Inez France, as the parents and next friends of Robert France, a minor, respectfully request that this Honorable Court reverse the ruling of the Circuit Court of Logan County, West Virginia, Perry, J. which improperly granted summary judgment in favor of Appellee Southern Equipment Company.

Respectfully submitted,

LANGLEY FRANCE, individually
and as the Parent and Next Friend
of ROBERT FRANCE,
By Counsel

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(304) 345-0346

Contract

Royalty Builder

WV # 031924

Rt. 2 Box 179A

Delbarton, West Virginia 25670

(304)426-6230

Dan Hensley - Owner

PROPOSAL SUBMITTED TO State Equipment PHONE DATE 5-2-2006

STREET JOB NAME

CITY, STATE & ZIP CODE JOB LOCATION Logan

We hereby submit specifications and estimates for:

26 gauge Metal on 180 feet building change all sky lights.

Labor only 15,000 ~~00~~ to be paid when jobs completed.

We Propose hereby to furnish material and labor - complete in accordance with above specifications, for the sum of:

dollars ($)

Payments to be made as follows:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or aviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above estimate. All agreements contingent upon strikes, accidents or delays are fully covered by Workman's Compensation Insurance.

Authorized Signature

Note: This proposal maybe withdrawn by us if not accepted within 30 days

Acceptance of Proposal - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

Signature

Date of Acceptance: Signature

SEC00011

EXHIBIT

A

SO EQUIPMENT COMPANY 42315

/03/06 1410000 $15000.00

SOUTHERN EQUIPMENT COMPANY
P.O. Box 325
Pecks Mill, WV 25547

BANKONE, WV LOGAN
LOGAN, WV
69-36
519

42315

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	DATE	AMOUNT
PAY TO THE ORDER OF: ROYALTY BUILDERS RT. 2 BOX 179A DELBARTON, WV 25670	05/03/06	$15000.00

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EXHIBIT
A

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Appeal No. 081348

LANGLEY and INEZ FRANCE, individually and
as the Parents and Next Friends of
ROBERT FRANCE, a Minor,

Appellant,

v.

SOUTHERN EQUIPMENT COMPANY,
a West Virginia Corporation,

Appellee.

CERTIFICATE OF SERVICE

I, L. Lee Javins, counsel for appellant, do hereby certify that the foregoing "**Reply Brief of Appellants**" has been served on counsel of record by depositing a true and exact copy thereof, via United States mail, postage prepaid and properly addressed on this 22nd day of **January, 2009,** as follows:

Gary E. Pullin, Esquire
Molly K. Underwood, Esquire
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JamesMark Building
901 Quarrier Street
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Counsel for Southern Equipment Company

L. Lee Javins, II (WV State Bar No. 6613)

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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